Supreme Court, U.S.
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No. 94-924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES ARTHUR "ART" POPE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees,

and

RALPH GINGLES, *et al.*,
Appellees.

Appeal from the United States District Court
Eastern District of North Carolina,
Raleigh Division

REPLY BRIEF OF APPELLANTS POPE, ET AL.

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REPLY BRIEF FOR APPELLANTS

I. The Appellants Have Standing.

A plaintiff who resides outside a racially gerrymandered district may establish standing, if such a plaintiff presents "specific evidence" tending to support the inference that "the plaintiff has personally been subjected to a racial classification." *United States v. Hays*, 115 S. Ct. 2431, 2436 (1995). Such specific evidence exists in this case as to three Shaw plaintiffs and the plaintiff-intervenors. *See* Shaw Reply Br. 6-8. Moreover, because two Shaw plaintiffs reside in the Twelfth District, they have unquestioned standing. *Hays*, 115 S. Ct. at 2436; *Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995). Thus, the plaintiff-intervenors, as permissive intervenors below, are "entitled to seek review, . . . to file a brief on the merits, and to seek leave to argue orally." *Diamond v. Charles*, 476 U.S. 54, 64 (1986).[1] In short, and in any event, the plaintiff-intervenors are able "to ride 'piggy-back'" on the "undoubted standing" of the two plaintiffs who reside in the Twelfth District. *Id.*[2]

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[1]As to the plaintiff-intervenors, the district court erroneously refused to permit the Chairman of the North Carolina Republican Party (Jack Hawke) to intervene in his official capacity. JA 13. The district court denied intervention to Hawke in his official capacity (i.e., to represent all registered Republican voters in North Carolina) because it believed that all voters in North Carolina had standing. *See Shaw v. Hunt*, 861 F. Supp. 408, 426 (E.D.N.C. 1994). It also reasoned that Hawke would inject politics into the case. Order on Motions to Intervene (E.D.N.C. Nov. 3, 1993). Neither rationale supported denying intervention. Thus, the district court should have permitted Hawke to assert the rights of registered Republican voters to be free of a racially gerrymandered districting plan. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 40 & n.8 (1981); *Andrus v. Sierra Club*, 442 U.S. 347, 353 n.8 (1979); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

[2]Assuming *arguendo* that no plaintiff or plaintiff-intervenor has standing to challenge the First District, this Court should nonetheless address its constitutionality given that one of the State's defenses is that the First and Twelfth Districts allegedly were designed to create a distinctively "rural" (i.e., First) and "urban" (i.e., Twelfth) district.

II. The First And Twelfth Districts Were Racially Gerrymandered.

All three judges on the district court recognized the predominant role that race played in creating both the First and Twelfth Districts.[3] This finding is not clearly erroneous. *See* Pope Br. 16-18; Shaw Br. 13-15, 18-22.[4] For North Carolina to now claim that race, "partisan/incumbent politics" and "socioeconomic commonalities" equally explain the creation and composition of the First and Twelfth Districts is "wholly unconvincing" and "disingenuous." *Hays v. Louisiana*, 839 F. Supp. 1188, 1199 (W.D. La. 1993), *vacated and remanded on other grounds*, 114 S. Ct. 2731 (1994).

North Carolina's argument that race, socioeconomic commonalities, and partisan/incumbent politics explain the shape of the First and Twelfth Districts and thereby defeat a claim of racial gerrymandering evinces a fundamental misunderstanding of whether a district is racial gerrymandered under *Shaw* and *Miller*. State Br. 33-34. Although the shape of the districts is relevant circumstantial evidence,[5] it is not the only relevant evidence. A non-bizarrely shaped district can be a racial gerrymander subject to strict scrutiny. *See Miller*, 115 S. Ct. at 2486-87. Thus, assuming *arguendo* that some of the more bizarre squiggles in the enacted bizarre lines of the First and Twelfth Districts were motivated by partisan/incumbent politics, such squiggles do not refute the overwhelming evidence demonstrating that race was the predominant factor in placing "a

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[3] *Shaw*, 861 F. Supp. at 417, 473, 474, 476; *id.* at 476 (Voorhees, C.J., dissenting) (agreeing with the majority's finding of a racial gerrymander); *id.* at 478 & n.6.

[4] The Solicitor General engages in Orwellian doublespeak when, throughout his brief, he describes the First and Twelfth Districts with a new phrase, "black opportunity districts," rather than the phrase "majority black districts" which the Justice Department used when the districts were established. *See* JA 147-54.

[5] *Miller*, 115 S. Ct. at 2486-88; *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

significant number of voters within or without the First and Twelfth Districts." *Id.* at 2488.

Stated differently, if a mapmaker is told to create two majority-African-American congressional districts in North Carolina as part of a congressional redistricting plan, the mapmaker will have to draw at least one of those districts with utterly bizarre lines in order to meet this two-district-racial-composition requirement. *See, e.g.*, JA 228. This is so because of the geographically dispersed African-American population. *See* JA 689; Ex. 301, Map 5; Ex. 200, p. 1218; T.T. 541. If the mapmaker then takes "incumbent/partisan politics" into account in shifting some voters in and out of the two majority-African-American districts -- while ensuring that the racial imperative is met -- the lines will get even more bizarre.[6] Such politically motivated movement of some voters does not defeat a *Shaw* claim. Moreover, if it does, then *Shaw* and *Miller* are dead letters because political power will always play a role in redistricting. In fact, the 1957 Alabama legislature "cloaked" its racial gerrymander of the borders of Tuskegee "in the garb of" political power. *Gomillion v. Lightfoot*, 364 U.S. 339, 345-47 (1960).

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[6]Actually, this is the process that John Merritt (Congressman Rose's staffer) went through in overhauling Representative Hardaway's "Optimum Congressional II-Zero" plan and drafting what would become the First and Twelfth Districts in Chapter 7. *See* Pope Br. 9-11. Cohen then got the plan directly from Merritt in early January 1992. Merritt Dep. pp. 40-42; T.T. 325, 500-02. Cohen then made some minor changes to Merritt's proposed districts, while ensuring that the First and Twelfth Districts remained majority-African-American. *See* Pope Br. 11-12; JA 244; *cf.* State Br. 14 (Chapter 7 is a slightly modified version of the Merritt plan).

III. The State's Alleged "Communities Of Interest" Do Not Save The First And Twelfth Districts.

The State claims that those who drew the First and Twelfth Districts and a majority of the General Assembly that enacted it did so in order to recognize communities of interest among "urban" African Americans and "rural" African Americans. The State's districting legislation, however, cannot be rescued by a *post hoc* "recitation of purported communities of interest." *Miller*, 115 S. Ct. at 2490; *see Hunter v. Underwood*, 471 U.S. 222, 231-33 (1985).

Before enacting Chapter 601, a handful of private citizens, among hundreds who made statements during redistricting, asked that districts be based on "communities of interest." JA 180-82, 188. The General Assembly, however, disregarded these statements by rejecting communities of interest as a criteria and by combining the "urban" African-American population in Durham with the "rural" northeastern African-American population to create Chapter 601's majority-African-American First District. *See* JA 125-26, 543.

Nor is there any indication that any of these comments had any impact following the Justice Department's objection to Chapter 601. For example, in his Optimum II-Zero Plan (the plan used by Merritt to draft the plan that was ultimately enacted by the General Assembly), Representative Hardaway removed Durham from the northeastern majority-African-American district -- not because of any alleged communities of interest -- but because he did not want to run against Durham Representative Mickey Michaux (another African American) in the Democratic primary for that congressional seat. JA 368-69; T.T. 355. Further, there is no evidence that Merritt knew of, relied upon, or cared about any statements concerning

communities of interest. *See* JA 58-59, 688-92; Merritt Dep., passim.[7]

Contrary to the district court's finding (*Shaw*, 861 F. Supp. at 467), neither the Senate nor House Redistricting Committees ever adopted a "convention" or "criteria" that the First District should be "rural" and the Twelfth District should be "urban." *See* Pope Br. 6 n.2. In fact, they expressly rejected "communities of interest" as a criteria regarding state redistricting. T.T. 1028-31. Moreover, given that the Merritt plan was adopted by the General Assembly after minor changes, the district court's finding that Cohen drew the majority-African-American districts in Chapter 7 after he received "instructions" to draw an urban and rural district is clearly erroneous. Indeed, Cohen admitted that the First District is located in a rural area and that upon reviewing Merritt's plan, he "noticed" the urban qualities of the Twelfth District and "reported" them to the legislative leadership. T.T. 343, 526.

The pretextual nature of the alleged "urban/rural" criteria is further shown by the State's failure to follow that criteria consistently, even where inclusion of allegedly urban or rural

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[7]The claim that the General Assembly relied on comments by private citizens Theoseus Clayton, Jr. (the son of now-First-District-Congresswoman Eva Clayton) and Robert Hunter during a January 8, 1992, public hearing, is particularly ludicrous. Sol. Gen. Br. 8, 12. First, both Clayton and Hunter made their statements at the very moment the Merritt plan was being imported into the State's redistricting computer by Cohen. *See* T.T. 327-28, 503-04. Second, there is no evidence that Merritt consulted Clayton or Hunter as he was preparing the plan. *See* Merritt Dep., passim. Moreover, in Clayton's case, the State obviously did not follow his suggestion that people "who shop in Durham" do not have any community of interest with people who live in Charlotte. JA 190. Similarly, Hunter's comments were not followed given that he suggested that all urban areas in the Piedmont -- including Raleigh which is not in the Twelfth District -- be treated alike. JA 189. Further, to suggest that Hunter had any influence on Chapter 7, given his position as counsel to the Republicans and the partisan way in which redistricting was conducted, is fanciful. *See* T.T. 464; Stips. 52-61; Stip. Ex. 11-18.

areas would be consistent with the alleged criteria or with geographic compactness. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). For example, contiguous majority-African-American precincts in Winston-Salem were fractured from other majority-African-American precincts and included in both the Twelfth and Fifth Districts to assist Congressman Neal. T.T. 351, 366-68; *cf.* JA 125 (Chapter 601 "did not divide black population concentrations"). Similarly, the section 5-covered "rural" counties of Granville, Person, Caswell, and Rockingham along the Virginia border were retained for partisan reasons in Congressman Neal's Fifth District, thus mixing these "rural" counties with the "urban" population of Winston-Salem. T.T. 349, 527. Additionally, North Carolina did not include Cabarrus County (which includes Kannapolis and Concord -- both urban areas with populations over 20,000) in the Twelfth District, in order to assist Congressman Hefner's Eighth District. T.T. 380-82; Def. Ex. 406; Ex. 341.

Other inconsistencies are found in the allegedly "rural" First District. Instead of attaching the rural Virginia border counties discussed above, white corridors were used to attach the First District's northeastern "rural" core to five different "urban" African-American communities found in southern and southeastern North Carolina. *See* T.T. 526-27; Shaw Br. 14. Further, the State failed to include in the First District six "rural" counties (i.e., Union, Anson, Scotland, Hoke, Robeson, and Bladen), all of which are covered by Section 5 and are located along the South Carolina border. T.T. 528; Ex. 301, Maps A, 1, and 4.

The pretextual nature of the "urban/rural" rationale is bolstered by the complete absence of any statement by any legislator concerning this alleged criteria until January 23, 1992, only <u>one</u> day before Chapter 7 was enacted. *See* JA 286-88. There is no indication in the legislative history that any legislator ever requested the General Assembly staff to attempt to construct a congressional plan that would include either a "rural" or an "urban" majority-African-American or majority-minority

district. The statements made in the contemporaneous legislative record concerning the alleged rural and urban qualities of the First and Twelfth Districts occurred only after the Democratic leadership had agreed to adopt the plan drafted by Merritt, following some minor changes by Cohen. *See* JA 155-58.

The district court erroneously found that Cohen "drew" the First and Twelfth Districts by using "place" reports generated by the State's redistricting computer. *See Shaw*, 861 F. Supp. at 467. Cohen did not "draw" Chapter 7. Indeed, the State admits and the record shows that Merritt drew the plan. Cohen only made "minor" modifications. *See, e.g.*, JA 244. Moreover, the "place reports" allegedly used by Cohen appear nowhere in the legislative record and were not mentioned or submitted to the Justice Department as a justification for either the First or the Twelfth District. T.T. 531-33. In fact, the State failed to produce the place reports as trial exhibits, and instead attempted to buttress Cohen's testimony concerning the population of North Carolina's cities with exhibits prepared for trial. As with the place reports, these exhibits also do not appear in either the legislative record or the State's section 5 submission in support of Chapter 7. *See* T.T. 428, 432-33. Although these documents may describe the population of the various cities included in the First or Twelfth Districts, the district court improperly relied upon them as evidence of a purported convention underlying the creation of Chapter 7.[8]

IV. Section 5 Does Not Provide North Carolina a Compelling State Interest.

North Carolina all but concedes that *Miller v. Johnson* forecloses the State's reliance on section 5 as a compelling state

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[8] *See Hays*, 839 F. Supp. at 1203 (any statistician "who looks at enough statistical characteristics (multi variate analysis) can find something distinctive about any district"); *Vera v. Richards*, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994) (rejecting Texas' similar *post hoc* "communities-of-interest" argument), *prob. juris. noted*, 115 S. Ct. 2639 (1995).

interest. *See* State Br. 40-41. Unlike its steadfast reliance on section 5 during its first trip to this Court in this case, it asks this Court not to resolve whether section 5 provided a compelling state interest and instead focus on section 2. *See id.* at 41. Because North Carolina's section 2 defense also fails, however, this Court should follow *Miller*, and reject the district court's holding that section 5 constituted a compelling state interest.[9]

V. Section 2 Does Not Provide North Carolina A Compelling State Interest.

A. The General Assembly did not Actually Rely on Section 2.

This Court has not hesitated to set aside findings associated with a clearly erroneous view of legislative intent. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158-59 (1993); *Hunter*, 471 U.S. at 229; *cf. White v. Weiser*, 412 U.S. 783, 792 n.12 (1973)(the

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[9]The Court should reject the argument that *Miller* is distinguishable from this case (1) because of the alleged absence of a Department of Justice "max-black" policy and (2) because the Department of Justice's "real" reason for denying preclearance of Chapter 601 was that Chapter 601 diluted the votes of African Americans. Gingles Br. 38-40; Sol. Gen. Br. 23-25. The "max-black" policy in *Miller* was a "proportional-representation" policy. *See Johnson v. Miller*, 864 F. Supp. 1354, 1385 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995). Moreover, even if there is a distinction between a "max-black" policy and a "proportional-representation" policy, the Department of Justice's use of section 5 to impose a "proportional-representation" policy would be an expansion of "its authority under the statute beyond what Congress intended and [what the Court has] upheld." *Miller*, 115 S. Ct. at 2493.

As for the claim concerning the Department of Justice's alleged "real" reason for denying preclearance to Chapter 601, Senator Winner's and Gerry Cohen's unrefuted description of John Dunne's contemporaneous, proportional-representation explanation for the denial of preclearance obliterates that claim. JA 201; T.T. 498. Moreover, even if it did not, section 5's "purpose" prong cannot plausibly be read to require the creation of two majority-African-American congressional districts in North Carolina, especially the First and the Twelfth Districts. *See Shaw*, 113 S. Ct. at 2830 ("in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires").

record is barren of proof concerning what the legislature supposedly relied on in drafting an apportionment plan). It should do so again in connection with the district court's finding that, following the denial of preclearance of Chapter 601, the General Assembly reevaluated Chapter 601 in light of section 2, concluded that section 2 required two majority-African-American districts, and then constructed the First and Twelfth Districts as a section 2 remedy. *See Shaw*, 861 F. Supp. at 463.

First, the State attempts to deflect the devastating impact of its own October 14, 1991, memorandum in support of preclearance of Chapter 601. JA 94-138; Ex. 25. The State cites nothing in the contemporaneous legislative record, however, of a section 2 reevaluation by a majority of the General Assembly, or a desire of the mapmaker (i.e., Merritt) or the "minor" map-modifier (i.e., Cohen) to create section 2 "remedial" districts, or a desire by a majority of the General Assembly to enact the First and Twelfth Districts as section 2 "remedial" districts.

The State does cite six portions of the "January 1992" legislative history wherein the word "*Gingles*" appears. *See* JA 195, 211-20, 223-36, 236-37, 258-261, 263-64. The cited statements were made by ten Senators and six Representatives between January 21 and January 24, 1992. The State fails to mention, however, that the slightly modified Merritt plan was introduced as a bill on January 21, 1992, and was enacted three days later. JA 59-61. Moreover, the cited statements were made after Merritt had drafted the plan and Cohen had slightly modified it. Upon reviewing the cited passages, the Court will see that no one ever explained or presented evidence (1) how the *Gingles* preconditions applied to the state of North Carolina or the counties encompassed by the First and Twelfth Districts;[10]

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[10]The Solicitor General claims that "numerous districting plans had been presented to the legislature that included two geographically compact black opportunity districts." Sol. Gen. Br. 12 (citing *Shaw*, 861 F. Supp. at 463-64). This is wrong. One glance at the cited maps demonstrates that none of these plans have two geographically compact majority-African-American districts.

(2) how any of the factors encompassed within a section 2 "totality-of-the-circumstances" analysis warranted the creation of two majority-African-American districts, much less the First and Twelfth Districts; or (3) why the State was abandoning Chapter 601. In reality, the discussion is focused on the belief by a few legislators that blacks "deserve" two majority-black districts based on historical discrimination or proportional representation.

Second, the Solicitor General claims that "the legislative leadership recognized that the facts and circumstances could support a challenge to any single-minority-district plan under *Gingles*." Sol. Gen. Br. 12. He ignores, however, that the three legislative leaders in charge of redistricting -- Speaker Blue, Senator Winner, and Representative Fitch[11] -- made unequivocal contemporaneous statements that the Voting Rights Act did not require creating two majority-African-American districts, and Speaker Blue and Senator Winner expressly and vociferously criticized the First and Twelfth Districts. *See* Pope Br. 33-34.[12]

See Stip. Ex. 10, Tab J; Def. Ex. 416; Def. Ex. 417; Def. Ex. 418; Stip. Ex. 10, Tab O&P; Stip. Ex. 10, Tab Q; Stip. Ex. 10, Tab R&S.

[11]Speaker Blue and Representative Fitch are African Americans. JA 44, 46-47.

[12]At trial Representative Fitch testified that he always personally believed that the Voting Rights Act required creating two majority-African-American districts. *Cf. Sullivan v. Finklestein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring) (the post-enactment views of a legislator concerning a statute are entitled to no weight); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (post-enactment statements are merely personal views of the legislator). In attempting to explain the inconsistency between his trial testimony and his numerous contemporaneous statements to the contrary (*e.g.*, JA 265, 286), he feebly explained that his contemporaneous statements were made while he was speaking "politically." JA 427; *cf.* John Bartlett, *Familiar Quotations* 613 (15th ed. 1980) ("When I use a word," Humpty Dumpy said, in a rather scornful tone, "it means just what I choose it to mean -- nothing more nor less." "The question is," said Alice, "whether you can make words to mean different things." "The question is," said Humpty Dumpty, "which is to be the

Third, the Solicitor General cites the district court's finding that the Justice Department letter denying preclearance "stated that [the Justice Department] believed that two majority-minority congressional districts meeting the *Gingles* criteria could be drawn in North Carolina and that Chapter 601's failure to do so constituted an impermissible dilution of minority voting strength." *Shaw*, 861 F. Supp. at 464. This finding is clearly erroneous. The district court defined the term "majority-minority" district to mean majority-African-American.[13] The Justice Department's letter, however, repeatedly and expressly distinguishes between a "majority-minority" district and a "majority-black district." JA 147-54. The Justice Department's letter nowhere states that two majority-black congressional districts meeting the *Gingles* criteria could be drawn in North Carolina or that the failure to do so in Chapter 601 violated the Voting Rights Act. *See id.*[14]

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master -- that's all.")(quoting Lewis Carroll, *Through the Looking-Glass* (1872)).

[13]*See Shaw*, 861 F. Supp. at 417 n.3.

[14]The Justice Department's denial letter discussed a "majority-minority" district in south central North Carolina in which Native Americans were combined with a plurality of African Americans to create a majority of minorities in one district. JA 152-53; *cf. Growe v. Emison*, 113 S. Ct. 1075, 1085 (1993) (assuming, without deciding, that distinct minority groups can be combined to assess section 2 compliance). It also discussed Chapter 601's majority-African-American district in northeastern North Carolina. JA 151-52.

Because the majority-minority district discussed in the Justice Department letter threatened Democratic Congressmen Rose and Hefner, Merritt drafted a two majority-African-American plan which would become Chapter 7. JA 58-59, 688-92; Merritt Dep. passim; T.T. 382. That plan included the "I-85" Twelfth District. JA 58-59. Thus, it is also erroneous to claim that North Carolina relied on the Justice Department's "legal analysis" given that North Carolina rejected the "majority-minority" district discussed in the denial letter.

Finally, the State's supporters claim that, in any event, the evidence at trial established the three *Gingles* preconditions and the requisite "totality of circumstances." This view is legally and factually flawed. Legally, a State cannot justify a racial gerrymander on grounds that did not actually lead to its enactment. *See Miller*, 115 S. Ct. at 2490; *see also Hunter*, 471 U.S. at 233. Factually, as discussed, no evidence exists which supports the notion that two "sufficiently large and geographically compact" groups of African Americans can constitute a majority in two "single member districts." *Gingles*, 478 U.S. at 50. Moreover, there was no evidence before the General Assembly concerning the other *Gingles* preconditions or concerning the totality of the circumstances as applied to the counties encompassed by the First and Twelfth Districts. In fact, whatever evidence and analysis existed demonstrated why two such districts need not be created. *See* JA 95-102, 105-14, 117, 123-38; Ex. 25, pp. 16, 17, 19, 20, 21, 28-43, 65.[15]

B. Even if the General Assembly Actually Relied on Section 2, Such Reliance was Improper.

The district court stated that the legislature need only find the three *Gingles* preconditions to have a "strong basis in evidence" for race-based districting. *Shaw*, 861 F. Supp. at 440. It then concluded "that conditions in North Carolina were such that the African-American minority could very likely make out a *prima facie* section 2 challenge to the Chapter 601 plan, or for that matter, to any other plan that did not contain two majority-minority districts." *Id.* at 463. The district court expressly rejected the view that *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), mandated an analysis of the "totality of the circumstances." *Shaw*, 861 F. Supp. at 440 n.27.

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[15]The Court should reject any reliance on the evidence presented at the *Gingles* trial. As North Carolina itself said, "the *Gingles* trial was in August 1983, almost ten years ago; therefore findings about conditions then cannot be assumed to be true today." JA 95; *see* JA 131.

We have explained why North Carolina could not have properly relied on section 2 as a compelling state interest. Pope Br. 35-40.[16] Assuming arguendo that the three *Gingles* preconditions exist in North Carolina, including the requirement that African Americans constitute a sufficiently large and geographically compact enough group to be a majority in two congressional districts,[17] the district court's holding that "information sufficient" to establish the three *Gingles* preconditions establishes a compelling interest to engage in race-based districting turns *De Grandy* on its head. *See De Grandy*, 114 S. Ct. at 2658 (error to "treat[] the three *Gingles* conditions as exhausting the enquiry required by section 2"); *Vera*, 861 F. Supp. at 1342 n.54. In *De Grandy*, the Court refused to adopt a "safe harbor" for states that voluntarily created apportionment plans in which "the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters percentage of the relevant population." *De Grandy*, 114 S. Ct. at 2660 (footnote omitted). The Court condemned the proposed "safe harbor" because it would have a tendency to induce states voluntarily and without analysis to create such districts in order to shield themselves from a section 2 challenge. *Id.* at 2661. Such districts, however, "rely on quintessentially race-conscious calculus aptly described as the politics of second best" and undermine the reality that coalition building and equal electoral opportunity exist outside such districts. *Id.* (quotation omitted).

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[16]As the Court did in *Miller*, we assume arguendo (without conceding) that section 2 could serve as a compelling state interest. *Miller*, 115 S. Ct. at 2490-91. For a powerful argument that section 2 cannot serve as a compelling state interest, see James F. Blumstein, *Racial Gerrymandering and Vote Dilution*: Shaw v. Reno *in Doctrinal Context*, 26 Rutgers L.J. 518, 571-75, 586-87 (1995). For a discussion of the enactment of the 1982 amendments to section 2 and their relationship to redistricting, see *id.* at 564-75.

[17]There is simply no evidence in the record that two geographically compact majority-African-American districts can be drawn. *See* Pope Br. 35-38. The district court's finding to the contrary is clearly erroneous. *See* Shaw Br. 28-30.

Under *De Grandy*, if following the denial of preclearance of a plan containing a single majority-African-American congressional district, a state creates two majority-African-American districts and claims that section 2 required such conduct, then a court reviewing a challenge to such districts should determine whether the legislature found the three *Gingles* preconditions to exist in connection with two congressional districts and then analyzed the totality of the circumstances through a "comprehensive . . . canvassing of relevant facts." *De Grandy*, 114 S. Ct. at 2647. The legislature's analysis should include "the extent to which minority groups have access to the political process." *De Grandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring); *see also Chisom v. Roemer*, 501 U.S. 380, 397-98 (1991) (requiring causal link between foreclosure from political process and lack of electoral success).[18] The legislature also should evaluate the first plan's "influence districts" as part of the "totality of the circumstances" under section 2. *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1099-1103 (W.D. Tenn.), *aff'd*, 116 S. Ct. 42 (1995).[19]

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[18]*Chisom* makes clear that there must be a causal link between the alleged foreclosure from the political process and an inability to elect representatives of one's choice. 501 U.S. at 397-98. That causal link cannot be assumed in this case given that two of the three people in charge of redistricting were African Americans, that by the end of 1990, 63% of eligible blacks were registered to vote as compared with 68.6% of whites (Ex. 25, p. 16), that Harvey Gantt's vote totals against Senator Helms in 1990 closely approximated those of Governor Hunt in 1984 (Stip. 142), that numerous African-American officials have been elected in North Carolina (JA 99-102; Ex. 25, p. 19), and, according to the only evidence offered by the State in the legislative record, the absence of racially polarized voting in the counties within the Twelfth District (JA 95-101; T.T. 496-97).

[19]Requiring a state drafting an apportionment plan to document its decision, rationale, and consideration of alternatives before enacting a plan is not novel. For example, Article I, section 2 of the Constitution requires states to justify any population deviation from exact equality in congressional districts with "explicit, precise reasons." *Karcher v. Daggett*, 462 U.S. 725, 733 n.5, 741

North Carolina's detailed, vociferous October 14, 1991, defense of Chapter 601 in the preclearance process unequivocally states that two geographically compact majority-African-American districts cannot be drawn. JA 103, 112, 133-34. There is no evidence to the contrary. Thus, the first *Gingles* precondition for two majority-African-American districts could not be satisfied. *See Voinovich*, 113 S. Ct. at 1157. Moreover, even if the legislature found that all three *Gingles* preconditions existed, North Carolina's defense of Chapter 601 explained in great detail why African Americans under Chapter 601 had an equal opportunity to elect an African American in the First and Fourth Districts. JA 123-30. North Carolina has never explained when, where, and why it concluded that its analysis was incorrect. As in *Miller*, "the congressional plan challenged here was not required by [section 2 of] the Voting Rights Act under a correct reading of that statute" because "there was no reasonable basis for believing that [Chapter 601] violated [section 2]." *Id.* at 2491-92.[20]

VI. The First And Twelfth Districts Are Not Narrowly Tailored.

Like the district court, North Carolina and its supporters believe that no traditional districting principles apply to a court's application of narrow tailoring to a racially gerrymandered district, except (1) compliance with one-person one-vote, and (2) ensuring the non-dilution of a particular minority group's vote. *See Shaw*, 861 F. Supp. at 449 (describing these two

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(1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31, 535 (1969). Moreover, for section 5 covered jurisdictions, a documentation requirement already exists. *See 28* C.F.R.§§ 51.20-51.28 (1995).

[20]We do not concede that Chapter 601 could have withstood a *Shaw* challenge. The majority-African-American district created in Chapter 601 did not result from any analysis of the Voting Rights Act. Rather, it was a cavalier political compromise between the chairmen of the redistricting committees wherein they agreed that African Americans would constitute a majority in one congressional district. JA 92, 133, 402-03.

requirements as the only traditional districting principles applicable to narrow tailoring); State Br. 45-47; Gingles Br. 46-50. Those two principles, however, would invalidate an apportionment plan regardless of *Shaw*. *Shaw*, 861 F. Supp. at 493 n.29 (Voorhees, C.J., dissenting). In short, the State and its supporters argue that a federal court must defer to a state's "decision" to ignore all traditional race-neutral districting principles in creating majority-African-American districts, such as geographic compactness, contiguity, and respect for political subdivision, and permit the creation and placement of such districts anywhere, in any shape, and for any reason. *See* State Br. 48-49.

Legally, if accepted, North Carolina's argument would obliterate the requirement that race-based legislation be narrowly tailored to achieve a compelling state interest by the least restrictive means practically available. *Miller*, 115 S. Ct. at 2490; *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984); *see United States v. Paradise*, 480 U.S. 149, 199 (1987)(O'Connor J., dissenting)(the legislation must "fit with greater precision than any alternative remedy"). In fact, it would provide states carte blanche to engage in racial gerrymandering in the name of section 2. *Cf. Shaw*, 113 S. Ct. 2831 (section 5 does not provide states carte blanche to engage in racial gerrymandering). Finally, it would contradict the strong suggestion in *Shaw* that "race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State 'employ[s] sound districting principles,' and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be a majority." *Id.* at 2832 (quotation omitted).

Narrow tailoring in the context of a racially gerrymandered district allegedly designed to comply with section 2 actually requires an analysis of numerous traditional race-neutral

districting principles: (1) the appearance of the district;[21] (2) whether the section 2 "remedial" district is geographically compact and provides a remedy to the geographically compact group of minorities whose allegedly diluted votes prompted the "remedial" action;[22] (3) whether the plan comports with or disregards traditional districting principles, such as geographical compactness, contiguity, and respect for political subdivisions.[23] "Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind." *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring); (4) whether the plan departs from objective, traditional districting criteria adopted by the submitting jurisdiction;[24] and (5) whether the district contains more segregation than necessary to provide African Americans an equal opportunity to elect candidates of their choice.[25]

Analyzing these factors demonstrates that Chapter 7 is not narrowly tailored to achieve a compelling governmental interest.

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[21]*Shaw*, 113 S. Ct. at 2827.

[22]*Miller*, 864 F. Supp. at 1390; *Shaw*, 861 F. Supp. at 490-91 (Voorhees, C. J., dissenting); *Vera*, 861 F. Supp. at 1343 n.55; *Hays*, 839 F. Supp. at 1196 n.21; *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1052 (D. Md. 1994) (per curiam).

[23]*Miller*, 115 S. Ct. at 2488; *Shaw*, 113 S. Ct. at 2826-27; *Miller*, 864 F. Supp. at 1387 n.40; *Vera*, 861 F. Supp. at 1343-44; *Hays*, 839 F. Supp. at 1206-09; *cf. Connor v. Finch*, 431 U.S. 407, 425-26 (1977) (the district court failed "adequately to explain its adoption of irregularly shaped districts when alternative plans exhibiting contiguity, compactness, and lower or acceptable population variance were at hand"); *see also White v. Weiser*, 412 U.S. 783, 790 (1973) (where other plans in the record demonstrate that it is possible and practicable to draw congressional districts with lower percentage population deviations, then such deviations are not "unavoidable").

[24]*Cf.* 28 C.F.R. § 51.59(f) (1995).

[25]*See Vera*, 861 F. Supp. at 1343; *Hays*, 839 F. Supp. at 1206-09.

See Pope Br. 5-6, 16-18. Only the second factor warrants additional comment.

Neither the First nor the Twelfth Districts are geographically compact or provide a remedy to a "geographically compact" group of minority plaintiffs who allegedly would have had a section 2 claim against Chapter 601. Incredibly, appellees and their supporters contend that a State legislature "remedying" an alleged section 2 violation may create a non-geographically compact "remedial" district and put it somewhere completely different than where the "large and geographically compact" minority who would otherwise constitute a majority in a single member district and who "needs" the remedy lives. *See* State Br. 47-48; Gingles Br. 47-50; Sol. Gen. Br. 26-30. In support of this position, the appellees and their supporters cite a variety of cases.

The cited cases provide no support for the proposition that a section 2 "remedial" district need not be geographically compact or that a legislature "remedying" a potential section 2 violation can place a section 2 remedial district anywhere in the state. In fact, all the cases recognize that constitutional and statutory standards circumscribe whatever deference is ordinarily

due to a state apportionment plan.[26] The Equal Protection Clause is one such constitutional limit. Moreover, at the narrow tailoring stage, the remedial district cannot go "beyond what was reasonably necessary" to comply with the Act. *Shaw*, 113 S. Ct. at 2831; *see City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989). Creating bizarre, non-geographically compact districts goes beyond what is reasonably necessary to comply with section 2.[27] Similarly, following a section 2 trial on the merits and a finding of liability, it seems obvious that a federal court would not and could not approve a "remedial" district that provided no remedy to the large geographically compact minority group meeting the first *Gingles* precondition.

Alternatively, and apparently in recognition of the legal implausibility that traditional districting principles are irrelevant to narrow tailoring, North Carolina argues that the legislature considered race and two "rational districting principles" in devising the First and Twelfth Districts: partisan/incumbent politics and socioeconomic commonalities in the "urban" Twelfth District and the "rural" First District. *See* State Br. 46-47. As explained earlier, North Carolina's reliance on this alleged "urban/rural" rationale in creating the First and Twelfth Districts is fictional. As for the State's interests in partisan/incumbent politics, such objectives are far removed from the constitutional requirement of narrow tailoring or

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[26] *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam); *Wise v. Lipscomb*, 437 U.S. 535, 541-42 (1978); *Connor*, 431 U.S. at 419-20; *White*, 412 U.S. at 797; *Burns v. Richardson*, 384 U.S. 73, 85 (1966); *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988).

[27] *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir.)(a section 2 remedy must include consideration of "traditional districting principles"), *vacated and remanded*, 115 S. Ct. 35 (1994); *Clark v. Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994) (any remedial plan must be narrowly tailored to correct the section 2 violation and be consistent with the spirit of *Shaw*); *Schaefer*, 849 F. Supp. at 1052-53 (courts should not order the creation of districts with "bizarre" or "dramatically irregular shapes").

remedying an alleged section 2 violation. *See Vera*, 861 F. Supp. at 1343.[28]

CONCLUSION

The judgment of the district court should be reversed.

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[28]When the State's position that it need not consider traditional race-neutral districting principles is combined with its position that it need not consider where the allegedly large, "geographically compact" minority group in need of a section 2 "remedy" lives, North Carolina's position really is that section 2 and the Fourteenth Amendment permit the creation of two congressional districts as follows: First, North Carolina could issue an "urban-African-American" racial identification/voter card to a majority of "urban" (however defined) African-American voters. Such cardholders would then vote in a congressional election in which they were a majority. Likewise, North Carolina could then issue a similar "rural-African-American" identification/voter card to people it believes are "rural" (however defined) African Americans. Such cardholders would then vote in a congressional district in which they were a majority. A sufficient minority of "urban" white filler people and sufficient minority of "rural" white filler people would receive an "urban" or "rural" "white filler person" racial identification/voter card in order to round out these districts so as to comply with the equal population requirement among districts. All the African Americans and white filler people in these two districts could be randomly chosen (or chosen for maximum partisan advantage) from "urban" and "rural" communities (however defined) throughout the state. North Carolina would contend that such districts are "functionally" compact, recognize urban and rural "communities of interest", and are "contiguous" because "any group of voters -- regardless of where they live -- can be fit into one contiguous district." *Schaefer*, 849 F. Supp. at 1052 n.38. Moreover, North Carolina would contend that such districts are narrowly tailored to achieve a compelling state interest. After all, the "communities of interest" would be even "stronger" than those in the current First and Twelfth Districts.

This scenario is the logical implication of the district court's reasoning and the State's argument. If accepted, *Shaw* will mean nothing and the elected officials will "believe that their primary obligation is to represent only the members of that group . . . ." *Shaw*, 113 S. Ct. at 2827; *cf.* JA 511 (one of the benefits of representing the Twelfth District is not "having to cater to the business or white community"). "This is altogether antithetical to our system of representative democracy." *Shaw*, 113 S. Ct. at 2827.

Respectfully submitted,

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